No. 2455

IN

The United States Circuit Court of Appeals

Ninth Circuit

N. COY
COMPLAINANT

VS.

THE TITLE GUARANTEE & TRUST COMPANY, a Corporation;
J. THORBURN ROSS, GEORGE H. HILL, et al
DEFENDANTS

MULTNOMAH COUNTY, OREGON, et al
Intervenors, Respondents
APPELLEES

R. S. HOWARD, Jr.
Receiver of The Title Guarantee & Trust Company, Intervenor
APPELLANT

Petition for Rehearing

WILLIAM C. BRISTOL
For Petitioner

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MULTNOMAH COUNTY, et al.,
Intervenors, Respondents, Appellees,

vs.

R. S. HOWARD, Jr.,
Receiver of The Title Guarantee & Trust Company,
Appellant,

In the Main Cause of

N. COY,
Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY, et al.,
Defendants.

Petition for Rehearing

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant feeling himself aggrieved herein by the decision, judgment and opinion of this Court given and rendered on Monday, the 1st day of February, 1915,

respectfully presents this his petition for a rehearing and for cause and ground therefor doth, with considerations of propriety and respect, show and represent:

First:

The following point was submitted to the Court in the record under the specifications of error and overlooked by it:

> "Moreover, on the 6th day of November, 1907, The Title Guarantee & Trust Company surrendered all of its property for the benefit of all of its creditors and upon the accomplishment of that act and the court's possession THE PERSONALTY THERE AND THEN BECAME IMMEDIATELY THE PROPERTY OF THE CREDITORS OF THE CORPORATION AND THERE COULD BE NO PERSONALTY BELONGING TO THE TITLE GUARANTEE & TRUST COMPANY UNTIL LIQUIDATION OF ALL OF THE PROPERTY it should appear that there was an overplus over the amount of all of its debts properly taxable as personalty to that company; AND THESE FACTS WERE NOT PROVED OR SHOWN BY THE INTERVENORS AND THERE IS A TOTAL FAILURE OF PROOF THEREABOUT."

(Pages 32 and 33 of main brief.)

Second:

The following point was submitted in the main brief and in the specifications of error and disregarded and overlooked by the Court:

"FURTHERMORE THE ONLY INSTANCE OF ASSESSMENT TO OR IN THE NAME OF THE RECEIVER WAS THE TAX ROLL OF 1913; AND NO EVIDENCE WAS OFFERED TO SHOW ANY SUCH ASSESSMENT WITHIN THE TIME OF THE PETITIONS.
(Record, p. 161.)

AND THIS POINT WAS CONCEDED BY THE COUNSEL FOR THE INTERVENORS UPON THE TRIAL.

(Record, pp. 161 and 162.)"

(Page 40 of main brief.)

And again in the main brief on page 43:

"The Title Guarantee & Trust Company on November 6, 1907, LOST FOR THE TIME BEING ALL DOMINION OVER ITS PROPERTY, HAD AND POSSESSED NO PROPERTY, EITHER PERSONAL OR REAL, AS A NATURAL PERSON. WHATEVER FUNCTION OF OWNERSHIP EVER EXISTED AS TO PERSONAL PROPERTY CEASED NOVEMBER 6, 1907; AND THEREFORE AN ASSESSMENT OF PERSONALTY TO IT WAS NOT AGAINST THE RECEIVERSHIP.

Pennsylvania Steel Co. v *New York City Ry. Co.,* 198 Fed. 777.

(Page 43 of main brief.)

Third:

It is submitted that the opinion of the Court does not apply fundamental considerations which it uses with reference to taxation to the facts in the case at bar. For illustration, the Court in its opinion quotes from Cooley on Taxation. (See opinion last part of first paragraph on page 4):

> "THUS UPON PROPER APPLICATION AND SUITABLE PROOF A RECEIVER WILL BE ORDERED TO SATISFY A TAX ASSESSED AGAINST THE PROPERTY IN HIS HANDS, AND A LIKE DIRECTION WILL BE MADE IN OTHER CASES WHERE FUNDS ARE HELD SUBJECT TO THE AUTHORITY OF THE COURT." (Opinion page 4.)

It is submitted that the Court has disregarded in this case the very essentials of the proposition asserted by the learned author. For in this case: *First, there was no proper application; second, there has not been suitable proof;* and, *third, there was no proof that any funds were held subject to the payment of this tax;* but the appellant sets out in his brief these very points (at pages 33, 46 and 48 and the evidence on page 38) to the contrary and there is not any denial of the same or other proof.

Fourth:

The whole of the Court's decree or order appealed from is set forth in the brief at page 29, and it is obvious from the reading of it and upon the face of it that the

Court only decreed upon the petitions for the years 1908, 1909 and 1910 *and not for the year* 1911 *at all,* and to that extent at least the suppositions of the learned Judge who writes the opinion on appeal are erroneous *for the reason that the Court below never did pass an order for the tax of* 1911.

But it is further respectfully shown that a close inspection of the order of the lower court shows that in each instance the sum ordered and adjudged to be recovered is the sum that was *"assessed against the personal property of The Title Guarantee and Trust Company for the year,"* but the entire evidence which is placed in the record does not show any such thing.

For instance, see the excerpts on pages 34 and 35 of the brief, which apparently escaped the attention of the Court, and also on pages 37 and 38, AND THE ONLY ASSESSMENT TO OR IN THE NAME OF THE RECEIVER WAS THE TAX ROLL OF 1913.

Fifth:

It is further respectfully shown that uniformity upon the same subject matter among the appellate courts of the several circuits of the United States is desirable and necessary, and that therefore this Honorable Court would be pleased to be in accord with the Circuit Court of Appeals of the Eighth Circuit.

That said Circuit Court of Appeals of the Eighth Circuit, through Judges Sanborn, Smith and Treiber, on the 10th day of September, 1914, in a decision published to the profession on the 24th day of December,

1914, in the case of MIDLAND GUARANTY & TRUST COMPANY v. DOUGLAS COUNTY, (217 Fed., p. 361) decided that where the receiver himself has listed property under a statute providing therefor (see 217 Federal, p. 361) and the corporation itself is hopelessly insolvent, then the receiver can be held for the taxes; and further held:

> "THE LAW HAVING PROVIDED ADEQUATE MEANS FOR COLLECTION, THAT REMEDY IS EXCLUSIVE."

Sixth:

It will be noted that in the Midland Guaranty case the trustee was made a party. It was a mortgage foreclosure and the Court had ordered the receiver to pay the balance in his hands on liens adjudged paramount to the mortgage being foreclosed; that the receiver had returned a schedule of the properties to the Board for taxation and that a levy was made of the taxes due the several Counties, and on the 10th day of November, 1913, the Counties demanded of the receiver the payment of the taxes AND THE RECEIVER APPLIED TO THE COURT FOR ITS ORDER AND DIRECTION IN THE PREMISES; the Court found that they should be paid and the trustee appealed to the Circuit Court of Appeals of the Eighth Circuit.

Seventh:

The case shows that Nebraska has a particular and special law providing as follows:

"Personal property should be listed in the manner following * * * 7. The property of a corporation whose property is in the hands of receivers, by such receiver."

THERE IS NO SUCH LAW IN OREGON.

Eighth:

The Court, however, says in considering these matters (217 Federal, page 362), having reference to the special statutory provision for the assessment of personal property taxes against property in the hands of receiver, that "if the railroad was legally assessed to the receiver as owner, as this was a tax on personal property, it was not only a lien upon all personal property of the receiver as such, but was a personal claim against him as such receiver."

Ninth:

It is perfectly obvious that there being no such law in Oregon it took the special and particular provisions of the statute in Nebraska to bring about such a legal result, for the Court continues to say, having reference to the Nebraska statute, which specifically provides for receiverships, that as the railroad was hopelessly insolvent the taxes would be lost to the Counties unless they were collectible from the receiver under some provisions of the statute of Nebraska referred to, and the Court concludes that they were so collectible, but in this cause the evidence does not negative the ability of the company ultimately to pay after creditors are satisfied.

Tenth:

But the strong inferences are that without special provision of the Nebraska statute, the full intent and meaning of the Court quite obviously shows that there is no method of reaching personal property in the hands of a receiver for taxes, even in Nebraska.

It is respectfully submitted that the opinion of the Circuit Court of Appeals for the Eighth Circuit, and particularly the fact that there was in that case considered on the appeal of the trustee, *not of the receiver,* the specific statutory provisions of the State of Nebraska, in connection with the facts on the record in the cause before the Court here, a case has not been made which brings the intervenor within the law as it is in Oregon. We are not dealing with general policy or expediency.

Within view of the foregoing, there being no statute in Oregon, the Supreme Court of the United States in *Lane County v. Oregon,* 7 Wallace 71, 19 Law. Ed. 101, both the Supreme Courts of the States of Oregon and Washington having decided that the statutory remedy must be followed (see cases cited in main brief, page 42), and it not being disproved that there were other assets after the creditors are paid out of which the intervenors demand against The Title Guarantee & Trust Company might be satisfied **there can be no recovery in this case upon the present intervenors' petitions as matter of law.**

It is respectfully submitted that the Court has overlooked the character of the application in this case, has

failed to see that suitable proof was not made of the tax, and has failed to recognize that there was no disproof of funds remaining over belonging to The Title Guarantee & Trust Company after all the creditors were paid to satisfy this tax, and finally that the decree of the Court below does not give as much to the intervenors as the present decision of this Court rendered February 1st undertakes to do; that is, this Court enlarges the lower Court's order.

The order of the 23rd of April, 1914, appealed from is squarely against *the fifteenth and sixteenth specifications of error,* which fact seems to have escaped the attention of the appellate court. Even if the prayers of the intervening petitions were granted, the order made is not in conformity therewith.

It is respectfully submitted that this Court of Appeals will not go further in decreeing payment of taxes than the Court below saw fit to go with its own receiver even if it finally concludes, in view of this petition, to reaffirm this decision, and the taxes for 1911 are not included in the order appealed from.

WHEREFORE, your petitioner doth say that he is especially aggrieved by the judgment, order and decision of affirmance wherein the order of April 23, 1914, and matters in addition thereto are adjudicated and yet leaves out of consideration the matters and things hereinbefore referred to in the particulars explained, and so it is that your petitioner prays a reconsideration of the decree of affirmance that full and complete justice may

be done, and if it be that this Court shall see fit to consider for the reasons given and a rehearing grant that such further order or direction be made so that the judgment, order and decree of April 23, 1914, may be in conformity with law and the facts and all questions upon the record determined, and your petitioner will ever pray.

R. S. HOWARD, JR.,
Receiver of The Title Guarantee & Trust Company,
Appellant.

WILLIAM C. BRISTOL,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA,
State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,
Counsel for Petitioner.